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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 515

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF.

EDWARD BRENNAN,
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All references to the official record in this cause are abbreviated "R. ——." The numeral following the "R" refers to the page of the official record.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

Your petitioner, John W Gleason, respectfully shows:

I

Your petitioner trading as the John W Gleason Cotton Company brought an action in the City Court of Savannah against the respondent, Seaboard Air Line Railway Company, who duly removed the cause to the United States District Court for the Southern District of Georgia because of diversity of citizenship. (R. 1 and 13.)

II

That the second count of your petitioner's pleadings and evidence showed:

Respondent is a common carrier with terminals at Savannah, Georgia, and employed at these terminals one McDonell

as its agent to give notice to the cotton trade of the arrival of cotton under order notify bills of lading. (R. 36, 43, 46, 123.) That on March 19th, 1925, the said McDonell acting within the scope of his employment and authority, and as agent for the respondent, notified your petitioner in the customary manner that a certain lot of cotton had arrived in Savannah under a designated order notify bill of lading requiring notice of arrival to be given your petitioner. (R. 36, 37, 38, 41, 45, 132.) That thereafter on the same date a local bank presented to your petitioner the designated bill of lading properly endorsed and attached to a draft drawn on your petitioner for Ten Thousand ($10,000) Dollars. (R. 45, 69, 70, 71.)

That relying upon the representation made by the respondent through its agent as above set forth your petitioner paid the draft and became the owner of the said bill of lading. (R. 64, 70.)

That the said bill of lading was a forgery; no such cotton was in existence nor arrived in Savannah. (R. 29, par. 7.)

The respondent proved: That McDonell on March 17th procured a leave of absence from the respondent. He proceeded to Charleston, S. C., where in furtherance of a fraudulent scheme, and without the real or apparent scope of his employment, he issued the forged bill of lading to the order of a fictitious person and under the name of that person drew on the Gleason Cotton Company, depositing the draft and bill of lading in a Charleston Bank to be forwarded for collection. The next day he returned to his duties at the respondent's Savannah office and there gave the false information to petitioner. The draft was paid as stated. McDonell then procured another leave of absence, returned to Charleston and obtained from the bank there the Ten Thousand ($10,000) Dollars which had been sent from Savannah.

The respondent then moved for a directed verdict stating "Now the Court quite properly over-ruled our demurrer to the Second Count, and the Court in over-ruling our demurrer said it was not apparent without inferring that disposition by McDonell to perfect some fraudulent independent scheme of his own, it is not apparent who issued it. But now that is undisputably stated. (R. 175.)

The trial Judge over-ruled the motion and charged that before your petitioner could recover on the Second Count the jury must find that the statement by McDonell that the cotton was actually on hand at Savannah was within the scope of his authority and that your petitioner parted with his Ten Thousand ($10,000) Dollars only after such assurance was given. (R. 189.)

The jury returned a verdict for your petitioner upon the Second Count. (R. 33.)

III

The United States Circuit Court of Appeals for the Fifth Circuit reversed the trial Court on October 28th, 1927, and denied a motion for a rehearing on December 5th, 1927. The case was there numbered 5103. The Circuit Court of Appeals held (21 Fed. (2) 883; R. 214) that the verdict upon the Second Count could not stand because:

It is "the general rule prevailing in the Federal Courts" that an employer is not liable for the fraudulent act of its employe *committed within the scope of his employment and authority* if that act is done to effectuate an independent fraudulent purpose of his own and not for the purpose of furthering his employer's business.

Your petitioner now complains of that ruling and judgment.

IV

The first reason which we urge for a review of that judgment of the fifth Circuit Court of Appeals is:

That there is not a single decision of any Federal Court (except perhaps one prior decision of the Fifth Circuit Court of Appeals) where this rule is the *ratio decidendi* of the decision.

That while the rule was apparently approved once by this Court citing with approval two English banking cases, which were believed to be authority for the rule, this was done by Chief Justice Fuller in the case of Friedlander vs. The Texas etc. Ry. Company, 130 U. S. 416 (1889) *when the rule was not covered by the pleadings nor argued in the briefs filed in the cause.*

That case was decided in accord with a long line of authorities from both this country and England. But Chief Justice Fuller, after deciding the case, did not stop. We most earnestly invite this Honorable Court's attention to our review of that case which will be found in our brief.

The House of Lords in Lloyd vs. Grace, (1912) App. Cas. 716; Am. Anno. Cases 1913 B 819, expressly and by name over-ruled those cases which had been cited by Chief Justice Fuller and stated that the parts of them which announced the so called rule could not be supported on either principle or authority and were not necessary for the decisions. That the law had been settled to the contrary as early as Lord Holt's time and approved by Mr. Justice Joseph Story.

V

The second reason which we urge for a review of the judgment of the Circuit Court of Appeals for the Fifth Circuit is that it ignores the true Federal rule, which was announced

by this Honorable Court in the case of Merchants Bank *vs.* State Bank, 10 Wall, 604. It is there held that a principal is liable for all of the misrepresentations of an agent within the scope of his authority and that "Those who create the trust, appoint the trustee and clothe him with the powers that enabled him to mislead—ought to suffer rather than the other party." And that the employer who holds out the employe as worthy of confidence should be the loser. It is said that Lord Holt approved the rule.

And this Court cited with approval cases in which the agent had acted fraudulently and for his own benefit. Mr. Justice Clifford who dissented had called attention on circuit (Federal case No. 9449) that Farmers and Mch. Bank *vs.* Butchers and Drovers Bank was not in point because there the servant followed an independent fraudulent scheme not for his master's benefit. But the majority of this Honorable Court cited with praise and approvel a long extract from that decision to the effect that in such a case the employer is liable, for he it is who selects the servant, holds him out as worthy of confidence and forces the public to deal with him.

In Armstrong *vs.* American Exchange Bank, 133 U. S. 433, officers of a bank had within the scope of their authority made false and fraudulent statements in letters (called non-negotiable certificates of deposit). These were in pursuance of an independent fraudulent scheme and not for the benefit of their employer. The employer was held liable.

VI

The third reason which we urge for a review of the decision in this cause is that the question involved is one of general law and great importance.

The employer is liable under the State law. Planters Rice Mill Company *vs.* Merchants National Bank, 78 Georgia 574.

The House of Lords in Lloyd *vs.* Grace *supra* considered the question of great importance and allowed the appeal in *forma pauperis*.

The Earl of Halsbury there said, "I should be very sorry to see a principle which appears to me of so great value shaken by any authority. No treatise on agency that I have ever come across has thrown any doubt on it—."

Lord MacNaughten there stated that it would be "absolutely shocking" not to hold the principal liable.

Lord Shaw said he did not think that it was ever distinctly meant to be said that in such a case the principal was not liable and that in practically all of not all of the cases holding otherwise the agent's fraud was not only for his own benefit *but a piece of conduct beyond the scope of his employment*.

The Canadian Law Times (1914), Volume 34, page 205, in a learned review of the rule holding the employer liable said, "Without it the affairs of every day life could not be carried on" and that it had been "finally settled on business-like principles."

We believe that our brief shows that the over-whelming weight of authority holds the employer liable.

Immediately upon the organization of the American Law Institute it commenced to prepare a restatement of the law of Agency. It recognized the subject as one of the most important with which it had to deal. It selected an eminent authority, Mr. Floyd Mechem, to prepare the preliminary draft. Mr. Mechem's views were well known. He had stated that in such a case as this the principal is liable. Paragraph 1990 of Mechem on Agency.

We submit that for this Honorable Court to permit the present decision in this case to stand unreviewed will not only severely handicap the American Law Institute in its attempt at a restatement of this branch of the law, but will also throw this important subject into the utmost confusion.

VII

As the fourth reason why the decision in this cause should be reviewed we submit that there is at present a conflict between the United States Circuit Court of Appeals for the Fifth Circuit and the United States Circuit Courts of Appeals for the Sixth, Eighth and Ninth Circuits.

In the Ninth Circuit a learned, able and full opinion in Bank of Palo Alto *vs.* Pacific Postal Tel. & Cable Company, 103 Fed. 841, had held an employer liable in such a case. The Circuit Court of Appeals affirmed the case, 109 Fed. 369 (1901). We quote from the first headnote of the decision of the Court of Appeals:

"A telegraph company is liable to a bank for the loss occasioned to the latter by its payment of money, without negligence, on a message purporting to have been sent by another bank, but which was in fact concocted and forged by an operator employed by the telegraph company——. In such case the act of the operator in sending the false message, although criminal and unauthorized by the company, was within the apparent scope of his employment, and if the message had been genuine would have been within his actual authority, and it was only by reason of such authority that he was enable to consummate the fraud."

We submit that the following decisions adopt the same rule in their respective Circuits:

Smith vs. First National Bank,
268 Fed. 780 (8th Circuit Court of Appeals 1920).
Certiorari denied, 254 U. S. 655-656.

National City Bank vs. Carter,
14 Fed. (2) 940 (Circuit Court of Appeals 6th Cir. 1926).

Wherefore your petitioner prays that a writ of certiorari may be issued by this Court and directed to the United States Circuit Court of Appeals for the Fifth Circuit to bring the cause and judgment now complained of to this Honorable Court for a review and determination.

EDWARD BRENNAN,
Counsel for John W. Gleason doing business as John W. Gleason Cotton Company, petitioner.

P. O. ADDRESS:
SAVANNAH, GEORGIA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No.____

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The petition for the writ of certiorari confines itself to the second count of our original complaint, which will be found on page 4 of the record.

The only question decided by the Circuit Court of Appeals for the Fifth Circuit or raised by the respondent's assignments of error (R. 196) relating to the second count is that the trial court erred in failing to recognize that:

"It is a general rule prevailing in the Federal Courts" that an employer is not liable for the false and fraudulent misrepresentations made by its employe *within the scope of his employment and authority* if the misrepresentation is

made to effectuate an independent fraudulent purpose of his own and is not for the purpose of furthering his employer's business.

We earnestly invite this Honorable Court's attention to the views of the trial Judge expressed on page 184 of the record and to the charge of the Court which begins on page 186 of the record. It will be seen from an examination of these that the misrepresentation was made by the agent of the respondent within the scope of his employment and authority.

It is our contention that in such a case:

1. The overwhelming weight of authority holds the employer liable.

2. The true Federal rule holds the employer liable.

II

THE WEIGHT OF AUTHORITY

In Hern vs. Nichols (*Nisi Prius* 1708, 1 Salk. 289) appears the following:

"And Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict."

We quote from Grammar vs. Nixon. *Nisi Prius*, Eyre, C. J., 1725 (1 Str. 653):

"A goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an essay then shown. Upon the evidence it

appeared he had forged the essay and that the ingot was made out of a lodger's plate, which he had stolen. And the Chief Justice held the master was answerable in this case."

It will be noted that the reasoning of Chief Justice Holt, if accepted, is applicable to all deceits of the employe committed within the scope of his employment. The decision of Chief Justice Eyre shows that no distinction was drawn in 1725 between those deceits committed for the benefit of the master and the deceits committed for the benefit of the servant.

In Lloyd *vs.* Grace, House of Lords, July 19th, 1912 (1912 A. C. 716; Am. Ann. Cases 1913 B, 819) a case in which an agent had committed a fraud for his own benefit, the House of Lords was of the unanimous opinion that the principal was liable. They considered the law as having been settled in Hearn *vs.* Nichols *supra* and approved by Mr. Justice Joseph Story. An elaborate review of the rule exempting the principal from liability when the agent acts for his own benefit and not for the benefit of the principal is contained in this case. The cases of Barwick *vs.* Bank and British Mutual Banking Company *vs.* Charnwood Forest R. Co., were fully discussed. Chief Justice Fuller had cited these two cases in the Friedlander case. The House of Lords stated that these two English cases could not be supported on principle or authority and that statements in them that the master was not responsible for such frauds of his agent were not necessary for the opinion. We shall not attempt an elaborate review of this decision of the House of Lords. We earnestly invite it to the Court's attention. We simply wish to call to this Court's attention that the rule announced by the Fifth Circuit Court of Appeals was not the law at the time of our separation from England and that it did not creep into the law of England until after the middle of the last century. The decision of the House of Lords shows that the rule recognized by those two decisions was never the settled law of England and that Judges, who had participated in Barwick *vs.* Bank, did not

consider that they were thereafter precluded from holding the principal liable in such a case.

Another review of the rule will be found in Volume 34 Canadian Law Times 205 (1914). It appears from this article that Canada had never recognized that the master was not responsible in such a case.

In 1881 Mr. Justice Oliver Wendell Holmes, Jr., in "The Common Law" page 231 referred to the attempt to exempt the master from liability as being local to England and in foot note 3, page 231, he meets the objections to holding the master liable by stating that they are the same objections attaching to the peculiar consequences of the relation of master and servant in general.

In 1906 William R. Vance in Michigan Law Review, Volume 4, page 209, referring to the dicta of British Mutual Banking Company vs. Charnwood Forest R. Company relieving the master from liability said: "This view seems unduly narrow, and inconsistent with many other cases to be found in the English Reports. It is certainly contrary to the great weight of authority in this country, it being well settled here that: 'The rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within the rule.'"

And Mr. Mechem in Section 1990 of his Treatise on Agency states:

"The English Courts had seemed to hold that the principal would not be liable in such a case, but that view has been now definitely discarded. The American cases have generally held the principal liable to innocent third persons where the representation was made in the course of the principal's business

and apparently for his account and while the agent was acting within the general scope of his authority, even though in the particular case he was secretly abusing his authority and attempting to perpetrate a fraud upon his principal or some other person for his own ultimate benefit."

In Tome vs. Parkersburg Railroad Company, 39 Maryland 36; 17 American Reports, Page 540, the Maryland Courts held the principal liable for the fraud of the agent committed for his own benefit, stating:

"The American doctrine on this subject is announced by Story, in terms equally emphatic and comprehensive, viz:

'It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds; yet, he is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of such misconduct or even if he forbade the acts or disapproved of them. In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency.' Story on Agency (7 Ed.) Ch. 17, Section 452; Penn. Del. & Md. Steam Nav. Co. vs. Hungerford, 6 G. & J. 291; Lord Holt's opinion in Lane vs. Cotton, 12 Mod. 490; Paley on Agency by Lloyd, 294, 301, 307; Bac. Abr. Master and Servant R. These principles apply as well to private corporations as to natural persons."

In 2 Corpus Juris on pages 849 and 850 appears the following:

"Acts of fraud by the agent committed in the course or scope of his employment are also binding on the principal even though the principal did not in fact know or authorize the commissions of the fraudulent acts and although he derive no benefit from the success of the fraud."

Three very good statements of this view of the law will be found in Planter's Rice Mill Company vs. Merchants National Bank, 78 Ga. 574; Bank of Palo Alto vs. Pacific Postal Tel. Cable Company, 103 Fed. 841, and Griswold vs. Haven, 25 N. Y. 595, 82 A. Dec. 380.

The following are a few of the decisions holding that the employer is liable:

Cleaney vs. Parker
167 Ala. 134, 140 Am. St. R. 21

Dregman vs. Morgan County National Bank
62 Col. 277, 162 Pac. 321 (6).

Bridgeport Bank vs. New York & N. H. R. Co.
30 Conn. 231.

First National Bank vs. Peck
180 Ind. 649, 103 N. E. 643.

Barnes vs. Century Savings Bank
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Allen vs. South Boston R. Co.
150 Mass. 200, 5 L. R. A. 716.

Engen vs. Merchants & Manufacturers State Bank
164 Minn. 293, 204 N. W. 963.

Berkovitz vs. Morton-Gregson
112 Neb. 154, 198 N. W. 868, 33 A. L. R. 85.

Fifth Avenue Bank *vs.* Railway Company
137 N. Y. 231, 33 Am. St. R. 712.

Havens *vs.* Bank of Tarboro
132 N. C. 214, 95 Am. St. R. 627.

Cincinnati *vs.* City National Bank
56 Ohio St. 351, 43 L. R. A. 777.

City National Bank *vs.* Martin
20 Texas 643, 8 Am. St. R. 632.

Appeal of Kisterbrock
127 Pa. 601, 14 Am. St. R. 868.

III

We desire to call attention to the fact that neither the general rule holding the master liable nor the so called exception to it, originated in cases dealing with misstatements in negotiable instruments and that cases holding the master responsible for such misstatements notwithstanding the fact that they were made for the agent's benefit were not in the majority of instances, dealing with negotiable instruments.

But we submit there can be no sound distinction between those two classes of cases. See:

Griswold *vs.* Haven, 25 N. Y. 595, 82 A. Dec. 380.

Statement of Samuel Williston on page 26 of Senate Document, 650 Sixty-second Congress Second Session, quoted elsewhere in our brief.

Particularly is this true in a case like the present when the misrepresentation was made directly to us. See:

Farmers & Merchants Bank *vs.* Butchers & Drovers Bank
16 N. Y. 125, 69 Am. Dec. 678.

IV

We also wish at this time to call to this Honorable Court's attention that the rule holding the principal liable for the fraud of the agent committed for the agent's benefit did not originate in cases dealing with officers of corporations, and is not peculiar to that branch of the law.

This Court in announcing the rule in Merchants Bank vs. State Bank, 10 Wall. 604, prefaced the announcement with the statement that it was the same law applicable to individual principals.

The English decisions relieving the principal from liability dealt with executive officers of corporations.

We submit that there can be no sound reason for twisting this about and saying that the principal is liable for the fraud of his agent committed for the agent's benefit when the agent is an executive officer of a corporation, but that the principal is not liable when the agent is not an executive officer of a corporation.

V

The true Federal rule will be found in Paragraphs V and VII of our petition for the writ of certiorari in this cause. We shall not encumber this brief by repeating what is there said. We only wish to call this Honorable Court's attention to the fact that what was said in Merchants Bank vs. State Bank, 10 Wall. 604, in regard to the principal's liability for representations of the agent was not stated in regard to negotiable instruments. This Court expressly declared that it was dealing with "the subject of the authority of the cashier of the State Bank to make the purchase, and (was) excluding

from consideration—the certified checks." It will also be noted that Mr. Justice Clifford who dissented urged the extension of the Freeman, 18 How. 187, where the doctrine of "conditional authority" was applied. The majority of the Court ignored this.

We reiterate that we have not found a single Federal decision (unless perhaps one prior decision of the Fifth Circuit) where the rule applied by the Fifth Circuit Court of Appeals in this case was the basis of the decision

VI

The facts of the Friedlander case were that the plaintiff filed suit against the Railway Company to recover for the non-delivery of certain cotton named in an alleged bill of lading of which they claimed to be assignees for value, after counting upon the said bill of lading they plead that the Railway Company was estopped from setting up the non-receipt of the cotton.

Chief Justice Fuller delivered the opinion of the Court, which held:

That an agent whose duty it is to issue bills of lading has no authority to issue a bill of lading until the goods therein described have been received; that his authority is limited to contracting for the transportation of goods actually delivered to the carrier; that until the goods have been so delivered he is without authority in the premises, and that a representation in such a case that the goods had been received was beyond the scope of his authority.

In support of this the Court cites a long line of cases applying the rule of "conditional authority," "the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain

contingency or the performance of a certain condition the occurrence of the event, or the happening of the contingency or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake." National Bank of Commerce vs. Chicago, Burlington & Northern R. Co., 44 Minn. 224, 9 L. R. A. 263.

Now if it were not within the scope of the employment of the agent to make representation as to the receipt of goods such representations would not bind the carrier whether made innocently or fraudlently. Mechem on Agency, Sec. 1988.

It will be noted that the pleadings in the Friedlander case did not attempt to recover upon an action for deceit and the briefs, filed by the attorneys arguing the case show, that the rule exempting the principal from liability when the agent acts for his own benefit was not argued.

However, the Chief Justice having rightly decided the case according to precedents and the pleadings, did not stop but decided to notice the theory being much discussed in England at that time and proceeded to apply that theory which the Fifth Circuit Court of Appeals holds is the general rule of the Federal Courts, that the master is only liable "for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In support of this rule the Chief Justice cites the case of Barwick vs. English Joint Stock Bank and the case of British Mutual Banking Company vs. Charnwood Forest R. Company. He also invites the reader's attention to Limpus vs. London General Omnibus Company.

As this statement of the rule is not only dicta but gratuitous since the point was not argued it is well to consider all of the cases mentioned by Chief Justice Fuller.

Barwick *vs.* English Joint Stock Bank was decided in the Exchequer Chamber 1867 (12 English Ruling Cases 298, L. R. 2 Ex. 259-267) and was a case in which it was alleged that in consideration of the plaintiff agreeing to sell J. D. certain oats for the use of J. D.'s contract with the Government, the defendants through its Manager promised that they would honor the check of J. D. in favor of the plaintiff in payment of the said goods on receipt of the money from the Government under the contract in priority to any other payment except to the defendant bank; that the defendant's Manager falsely and fraudulently represented to the plaintiff that J. D. was not then and there indebted to it, the plaintiff relying upon the defendant's promise furnished the oats; J. D. gave their check to the plaintiff; the defendant received from the Government money more than sufficient to pay the check but refused to do it and appropriated the money so received to the payment of a debt due the defendant by J. D. Upon the trial of the case the Court non-suited the plaintiff.

The Exchequer Chamber reversed the trial court and held "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In that case there was no question of the officer of the bank acting for his own benefit. The case is fully reviewed in Lloyd *vs.* Grace *supra* where Lord MacNaughten's opinion there rendered shows that Judges, who participated in the judgment of Barwick *vs.* The Bank, did not consider they were precluded from holding the principal liable for the deceit of the agent committed for the agent's own benefit, provided the act was within the scope of the agent's employment.

The next case cited by Chief Justice Fuller is British Mutual Banking Company *vs.* Charnwood Forest R. Company decided by the Court of Appeals 1878 (18 Q. B. D. 714). In that case an attempt was made to hold the corporation liable for the fraudulent issue of certificates of stock in excess of the amount which the Company was authorized by

law to issue. The action was in deceit for the false statement of the secretary of the corporation made in regard to the stock but for his own benefit. The decision is by Lord Bowen who stated that the Company could not be held liable in contract for any such contract would have been beyond their corporate powers; that if the action could be maintainable at all it must be upon the ground of deceit. "But how can a Company be made liable for a fraudulent answer given by their officers for his own private ends by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the Company had no power to bind themselves to the consequences of any such answer." Lord Bowen also mentions with approval the dicta in Barwick vs. The Bank to the effect that the fraud of the servant must be for the master's benefit before the master is bound. Lord Esher concurred in the result, but stated he based his decision upon the ground that the deceit was not for the benefit of the corporation. Lord MacNaughten in Lloyd vs. Grace stated that the decision of Lord Bowen in reference to the question under discussion could not be supported upon principle or authority, and that the opinion so expressed was not necessary for the decision. Lord Shaw concurred in this statement of Lord MacNaughten, and added "that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary the principal is, in such circumstances, legally responsible for his agent's conduct.

"I incline to the view that in most, if not all, of the cases cited in argument, it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment."

The next case mentioned by Chief Justice Fuller is Limpus vs. London General Omnibus Company (English Ruling cases, Vol. 17, page 258, 32 L. J. Ex. 34) which Chief Justice Fuller did not contend supported his proposition, but which he simply invited to the attention of the reader. This was a case in which the defendant's driver drove an omnibus against another omnibus belonging to the plaintiff. The trial court charged that the defendant was liable for the act of its servant whether done recklessly, carelessly or wantonly, if it was done in the course of his service and in doing it he believed it to be for the interest of the defendant. But "that if the true character of the act of the defendant's servant was that it was an act of his own, and in order to effect a purpose of his own, the defendant was not responsible."

The verdict was for the plaintiff. The plaintiff did not except to the charge. The defendant excepted claiming that the Court should have charged that if the driver acted wilfully the defendant was not liable. The defendant's exceptions were over-ruled.

The case is one of actual agency. The Circuit Court of Appeals for the Fifth Circuit in this cause gave a reference to Corpus Juris dealing with cases of actual agency. We wish to call to this Honorable Court's attention that while the question of actual agency is important in ordinary actions based upon trespass, etc., it is unimportant in actions for deceit. Mechem on Agency, Section 1989. This Court has recognized the great distinction between these two classes of cases when an attempt was made to have this Court apply the doctrines applicable to actions for deceit to the facts of a case which fell clearly within the rule of actual agency.

Chief Justice Taft stated: "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency —." In our case it is not a question of actual agency, but it is "a question • • • of holding out an appearance of authority on which some third person acts." United Mine Workers of America vs. Coronado Coal Co., 259 U. S. 344; 66 L. Ed. 975, on page 395 of the official report and 989 of the Law Edition.

VII

The dicta of Mr. Chief Justice Fuller has not become the settled law of the Federal Courts.

We have recently found the case of Dun vs. City National Bank (Second Circuit decided October 17th, 1893), 58 Fed. 174. We have not seen another Federal case approving that view of the law unless it be one prior decision of the Fifth Circuit Court of Appeals.

The facts in the Second Circuit case were that a bank had subscribed to Dun's Mercantile Agency; the agency agreeing to obtain and furnish the bank with credit information. The contract stipulated that the information would be obtained by Dun through servants, attorneys, etc., who would be sub-agents, and that Dun was not to be responsible for the neglect of these sub-agents or in anywise to guarantee the correctness of the information. The bank requested certain information. One of the servants referred to in the contract transmitted to Dun's office false information for the servant's benefit. Dun's office gave the information to the bank which acted upon it to its damage.

The Second Circuit Court of Appeals held that the contract did not contemplate that Dun would be liable in such a case. *The construction of the contract was the basis of the decision.*

The Court cited with apparent approval Chief Justice Fuller's dicta. But the Court was careful to state: "The briefs and arguments of counsel on the appeal were largely devoted to a discussion of the liability of an innocent principal for the frauds and deceit of his agent, causing damage to a third party. That the decisions are not altogether harmonious must be conceded."

The trial Court had completely ignored Chief Justice Fuller's dicta in a very learned and well considered opinion delivered in 1892. The decision is reported in 51 Federal 160. We earnestly invite it to the Court's attention.

In the present case the Fifth Circuit Court of Appeals cited with approval the case of Harriss, Irby & Vose *vs.* Allied Compress Company, 6 Fed. (2) 7. That was a case in which it was attempted to hold a warehouse company for a false warehouse receipt issued by its agent without the receipt of the goods therein described. The false receipt had been issued for the benefit of the agent. The Circuit Court of Appeals for the Fifth Circuit did not discuss the dicta of Mr. Chief Justice Fuller and only stated that it would apply the Federal rule instead of the State rule, and that under the Federal rule the warehouse company was not liable and cited four decisions from this Court. In three of these decisions the theory relieving the principal from liability when the fraud is for the agent's benefit was not mentioned. The basis of all the decisions cited was the doctrine of "conditional authority." We submit that that doctrine, unless limited, is applicable to warehouse receipts.

Unless that decision has the effect of approving Chief Justice Fuller's dicta there is not a single Federal case which we have been able to find making that dicta the basis of a decision.

VIII

The Circuit Court of Appeals stated that Congress in passing the Uniform Bills of Lading Act impliedly approved the rule which had been stated in the Friedlander case by legislating upon the subject and creating an exception to the rule instead of abrogating it.

But we submit that the adoption of a uniform act by a Legislature should not imbed into the law of that jurisdiction all of the vagaries of reason stated as dicta to sustain a judgment when that judgment has finally been condemned as destroying uniformity and injuring commerce.

The uniform Acts are not drawn for only one jurisdiction, and this Honorable Court has declared that a Uniform Act "should not be regarded merely as an off shoot of local law." Commercial National Bank *vs.* Canal Louisiana Bank & Trust Company, 239 U. S. 520.

When we consider a Uniform Act "former local views" must be forgotten. See:

Vett *vs.* Giles, 281 Fed. 928.

Union Trust Company *vs.* McGinty, 212 Mass. 205; Anno Cases 1913 C. 525.

But we believe that statement of the Circuit Court of Appeals is inaccurate. Congress was informed that the Bill of Lading Act had been drawn by Samuel Williston (Congressional Record, Vol. 48, Part 11, Sixty-second Congress, Second Session on Page 11,437). Mr. Williston's statement to the Senate Committee (quoted on page 28 of our brief) shows that he considered that the carrier's exemption from liability in the particular case discussed was an exception to

the general rule, and that by abrogating the exception the law would be uniform "that the man who hires an agent to do a certain job must be answerable for the consequences of that agent's acts in that job whether he does it well or ill."

IX

Since the doctrine of "conditional authority" is not involved in this case we have not discussed it in this brief. In order that this Honorable Court may examine that doctrine if it sees fit we have attached to our brief a memorandum covering that subject.

Respectfully submitted,

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APPENDIX

THE DOCTRINE OF CONDITIONAL AUTHORITY

This rule, its meaning, nature and extent has been much misunderstood, discussed, defended and abused. We shall attempt to confine ourselves to matters which are not disputed since in the present case the able and astute counsel for the respondent conceded that the Court properly over-ruled his demurrer to our petition which showed that no cotton was on hand in Savannah at the time McDonell represented to us that the cotton had arrived at Savannah. In fact the respondent has never complained nor assigned error upon the over-ruling of the demurrer. Neither the demurrer nor the ruling thereon was taken to the Circuit Court of Appeals to be reviewed. And since the only question raised by the respondent's assignments of error was the failure of the trial Court to recognize the so called rule relieving the principal from liability for the fraud of the agent when acting for his own benefit, and since that was the only question of law decided by the Circuit Court of Appeals we shall not attempt to be exhaustive in our review of the doctrine of conditional authority.

Mr. Mechem discusses this doctrine in paragraphs 756 *et seq.*, of his treatise on Agency.

The author calls attention that the most important limitation upon this rule is the one which deals with "conditions necessarily and peculiarly within the knowledge of the agent."

He insists that this limitation should be given effect in warehouse receipts and bills of lading cases, where it is well known that the authority to issue warehouse receipts and bills of lading is conditional upon the receipt of goods by the agent but where the knowledge of whether or not the goods were so received is necessarily and peculiarly within the knowledge

of the agent. Mr. Mechem further points out that this Court, the English Courts and a majority of the American State Courts had refused to give effect to this limitation in bills of lading cases.

However, when the doctrine of conditional authority is to be given full effect it is, of course, immaterial whether the agent acted innocently but was mistaken as to the existence of the condition or whether the agent knew the condition did not exist but acted for what he considered was the best interest of his principal, or whether the agent knowing the condition did not exist acted fraudulently and for his own benefit.

The one and only thing important to determine in all such cases is whether or not the condition existed upon which the agent's authority depended. National Bank of Commerce *vs.* Chicago, Burlington & Northern R. Co., *supra*.

It is possible that the decisions of this Court dealing with bills of lading issued without the receipt of the goods therein described may have the effect of denying that the doctrine of conditional authority is limited where the condition is necessarily and peculiarly within the knowledge of the agent. William R. Vance assumes that such is the case in his brilliant attack upon the decision of this Court in the Freidlander case, and his equally vigorous attack upon the attempted limitation of the rule. Mr. Vance takes the position that the act of issuing a bill of lading amounts to a representation that the goods were received by the carrier and that this representation should be governed by the law applicable to the non-contractual representation of servants, which branch of the law does not recognize the truth as a condition necessary for the authority to make a statement and concerns itself only with the question as to whether or not the representation was within the scope of the servant's employment. (4 Mich. Law Review 199.)

Other authorities have taken the view that the decisions of this Court have not denied the existence of this limitation upon the doctrine of conditional authority but that they have simply held that bills of lading were to be treated in a class to themselves like bills of exchange accepted per procuration as held by Chief Justice Jervis in Grant vs. Norway, 10 C. B. 665, the first of this line of decisions.

This is apparently the view of Mr. Samuel Williston who says:

"The law laid down by the Supreme Court of the United States, following an early English case, is that under these circumstances a carrier can say that the agent who issued that bill had no authority to issue a bill of lading unless he had received the goods. I venture to say, in spite of the authority of the Supreme Court of the United States, that it seems to me that that was a mistaken view. I should not venture to say that if there were not the authority of many State Courts in support of the contrary opinion; if it were not true that on the Continent of Europe, where the same sort of question occurs, the law is uniform that the carrier is liable. But the Supreme Court of the United States, and a majority of the States which have decided the question, do hold the carrier harmless, and we seek to hold the carrier liable. *We say that there is no more reason why a carrier should not be responsible for the act of his agent in this particular than why any man should not be responsible for the act of his agent in the course of his business*, and especially is this true because of the way these bills are generally issued." (Senate Document No. 650 Sixty-second Congress, Second Session, page 12 and 13.) The italics are ours.

Mr. Williston further stated on page 26 of the same Document:

"Of course if a bank cashier wrongly certifies a check, although his authority may be said to be only to certify

checks where there is money enough in the bank, the bank pays the bill. If it is urged that a check is a negotiable paper and that the rule ought to be peculiar to negotiable paper, I should say the same rule is applicable to a certificate of stock; that if the officers whose business is to issue certificates of stock issues one which they have no business to issue, under the circumstances, because they have not taken up genuine certificates to represent it, the Company has got to pay the bill. And the fundamental principle back of it all, it seems to me, is this, that the man who hires an agent to do a certain job must be answerable for the consequences of that agent's acts in that job, whether he does it well or ill."

And this latter view seems to be borne out by the fact that this Court in Iron Mountain *vs.* Knight (122 U. S. 79) quoted with approval Lord Esher's statement that he always considered the case of Grant *vs.* Norway to mean that the special limitations upon the authority of the master of a vessel were known among mercantile persons and that they had no right to rely upon representatitions made by the master.

We shall not pursue the subject further than to call attention to the fact that the authority of an employe to give information in regard to a particular class of matters cannot be conditioned upon the information being true (Mechem on Agency, Par. 1786 and 1987) any more than the authority of an employe to do a particular class of acts can be conditioned upon him doing them properly and without negligence or fraud. (Vance in Mich. Law Review, Vol. 4, page 199.) Otherwise, of course, an employer could never be held liable for the false or fraudulent acts of his employe unless he expressly authorized or ratified them.

The failure to understand the doctrine of conditional authority has caused some confusion in an excellent work.

We quote from Fletcher's Cyclopedia of the law of Private Corporations beginning on page 5230:

"But an officer or agent of a corporation may take advantage of his position to perpetrate a fraud upon third persons, acting, not for the corporation, but for his own benefit, and in violation of his duty to the corporation. In such a case he certainly does not act in the course of his employment, but he may act in the apparent course of his employment, and thus deceive the other party. The question then arises whether the corporation or the innocent third person should suffer, both in fact being innocent, and, in answering this question, the courts have differed. Some of the courts hold that where an officer or agent of a corporation perpetrates a fraud upon an innocent third person, but for his own benefit, and not for the benefit of the corporation, the corporation, being without fault in the matter, is not liable, although the officer or agent may have acted in the apparent course of his employment. (4) The weight of authority, however, in this country at least, is to the contrary, and to the effect that a corporation is liable to innocent third persons, by estoppel, for the fraud and deceit of its officers and agents, acting in the apparent course of their employment, although it did not authorize or know of the fraud or deceit, and although it may have been committed by the officer or agent for his own benefit, and with intent to defraud the corporation. *This doctrine is that, 'where the principal has clothed his agent with power to do and act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.'*

In accordance with this doctrine, it has been held that a corporation is liable to innocent third persons for the act of its agent, having general authority to issue certificates of

stock, for fraudulent issuing certificates for his own benefit; that a railroad or warehouse company is liable for the fraudulent act of its agent, having general authority to issue bills of lading or warehouse receipts upon the receipt of goods, in issuing a bill of lading or warehouse receipt without receiving goods, although he may act for his own benefit, though a contrary view is held in some decisions; (9) that a bank is liable for the fraud of its cashier in drawing checks in favor of customers of the bank, without their knowledge, and without intending them to have any interest therein, and then forging their indorsements and delivering the checks to third persons, to be collected for his own benefit; and that a telegraph company is liable for the act of its operator in sending a forged telegram requesting the transmission of money, although he acts for his own benefit."

We have placed in italics that part of the work which we believe causes confusion. The author states that it is the reason for holding a corporation liable for the deceit of its agent.

We submit that this is inaccurate; that it is the reason for the existence of the limitation upon the rule of conditional authority; that it is the reason why a principal will be held liable for the act of an agent when the agent is not authorized to act unless certain conditions exist, but the existance of those conditions is peculiarly within the knowledge of the agent.

The reason given relates to the question of the agent's authority and it is immaterial whether the agent acted fraudulently or honestly. Arnold *vs.* National Bank of Waupaca, Wis., 105 N. W. 828, 3 L. R. A. (N. S.) 580.

The fourth footnote to the article is as follows:

"Friedlander *vs.* Texas & P. R. Co., 130 U. S., 416, 32 L. Ed. 991; British Mut. Banking Co. *vs.* Charnwood Forest Ry.

Co., 18 Q. B. Div. 714, and other cases specifically referred to in the notes following."

As pointed out in our brief that part of the Friedlander decision which supports the text is dicta not covered by the pleadings nor arguments, and the British Mutual Banking Company case was expressly over-ruled by the House of Lords.

The only "other cases specifically referred to in the notes" are in footnote nine on page 5232.

In this ninth footnote is cited the Friedlander case and Pollard *vs.* Vinton, 105 U. S. 7, two English cases and one case from each of the States of Maryland, Minnesota and North Carolina.

Now Pollard *vs.* Vinton, 105 U. S. 7, was squarely decided upon the question of authority. The effect of an agent's deceit was not discussed. In fact it was apparently treated as immaterial for the Court stated:

"But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb and Co. (the agents) we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority."

The first English case cited is Grant *vs.* Norway, 10 C. B. 665. Neither the pleadings nor the opinion of the Court disclosed fraud or negligence by the agent. The case holds that from the generally known usage of the trade a bill of lading may be liken to a bill of exchange accepted per procuration.

The next English case is Cox *vs.* Bruce, 18 Q. B., D. 147. Not one word is said in that case about the agent's fraud. Lopes L. J. who concurred in the judgment said that there was

an attempt to hold the principal liable for the negligence of the ship master. Lord Esher delivered the opinion. We have mentioned it elsewhere in our brief.

Not one of the three American cases cited decides that the principal is not liable because of the fraud of the agent. They hold the principal not liable notwithstanding the fraud of the agent.

Each one of the States mentioned in this footnote holds the principal liable for the fraud of the Agent committed for the agent's benefit when the act is within the scope of the agent's authority. See pages 14 and 15 of our brief. And the same is now true of England.

All of the cases in this footnote deal with the doctrine of conditional authority as applied to bills of lading.

We submit that the only authority cited sustaining the statement of the text that some courts hold the principal is not liable when the agent acts for his own benefit is the overruled English case and Mr. Chief Justice Fuller's dicta citing that case delivered at a time when the question was not covered by the pleadings nor argued by the counsel.

Of course we agree with the statement in the text that the weight of authority holds the principal liable.

Respectfully submitted,

EDWARD BRENNAN,
Attorney for Petitioner.

Office Supreme Court, U. S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 715 51

MOTION FOR PERMISSION TO MAKE REPLY AND REPLY TO RESPONDENT'S ANSWER FOR A WRIT OF CERTIORARI

EDWARD BRENNAN,
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IN THE

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OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 715

REPLY TO ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

Now comes the petitioner and respectfully moves this Court for permission to make the following reply to the respondent's answer:

On page 6 of the answer it is stated that Part II of the Railroad's brief in the case of Friedlander vs. Texas, etc. 130 U. S. 416, was devoted entirely to a discussion of the rule now adopted by the Fifth Circuit Court of Appeals. The original brief is of file in the office of the Clerk. We earnestly request that it be examined, bearing in mind that the doctrine of "conditional authority" and the rule contended for by

the respondent are entirely distinct and unrelated. We believe that this Court will agree with us that the argument made went to the question of the agent's authority. It is certain that not one of the cases cited by Mr. Chief Justice Fuller to sustain his dicta was mentioned much less discussed.

On page 7 of the answer is cited an extract from Harriss, Irby and Vose vs. Allied Compress Company, 6 Fed. (2) 7. This case is fully reviewed in our brief. We there charge that three of the decisions cited by the Circuit Court of Appeals did not involve the rule now adopted by that Court. The respondent does not deny this. An examination of those cases will show that it is true.

On page 8 of the answer the opinion in Armstrong vs. American Exchange Bank, 133 U. S. 433, is discussed. This opinion dealt with two cases, one numbered 1110 and the other numbered 1111. Case No. 1110 dealt with a draft. Case No. 1111 dealt with a letter called a non-negotiable certificate of deposit. In our petition we called attention to that part of the decision dealing with the non-negotiable certificate of deposit, which was, therefore, case No. 1111. The respondent in its attempt to distinguish that case has seen fit to quote from case No. 1110, matters which are in no wise applicable to case No. 1111.

On page 9 of the answer is quoted one sentence from Mr. Mechem. The sentence immediately following the one quoted must be read in connection therewith to understand the meaning of the author. It will be noted from a reading of the complete text and particularly from a reading of foot note 27 that the author does not contend that the view taken by the Circuit Court of Appeals in this cause was the law anywhere when his work was published.

On page 10 of the answer it is said that Mr. Mechem "then" discusses fraudulent bills of lading. This is an error. The respondent should have said that Mr. Mechem *had* more than two hundred pages previously discussed fraudulent bills of lading when dealing with the doctrine of "condiitonal authority," which doctrine does not concern itself with the motive of the agent, and that the authorities cited in the foot note deal with that doctrine.

At the bottom of page 10 of the answer appears a citation from Labatt dealing entirely with the doctrine of "conditional authority."

It will be noted that the respondent with great labor attempts to show that some authorities recognize that there exist somewhere the rule now contended for by it, but that it has not cited a single case other than the cases of Friedlander vs. Texas etc., and Harriss, Irby and Vose vs. Allied Compress Company.

On page 11 of the answer it is said that Bank of Palo Alto vs. Pacific etc. 103 Fed. 841, was decided under the local law of California, and that the case "does not mention or pretend to discuss the Federal Rule." We submit that this is a mistake. The first head note states that the principal "is liable both under the general principles of law and under Civil Code of California * * ." The Court cites cases from New York, Minnesota, California, South Carolina, Nevada, and from this Honorable Court and several other Federal Courts, and from these reaches its conclusions.

The Circuit Court of Appeals in the same case 109 Fed 369, decided the case entirely on the question of general law

On pages 12 and 13 of the answer it is said that the cases of Smith vs. First National Bank, 268 Fed. 780; 254

U. S. 655 and National City Bank vs. Carter, 14 Fed. (2) 940, were decided on questions of local law. Not a single State statute nor a single State decision is cited in those opinions. There is nothing in those cases which warrants such a criticism. Both cases dealt with the authority of agents of National Banks, and the liability of a National Bank for the fraud of its agent, which is certainly a question of general law.

Respectfully submitted,

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